BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

POINT I.

The Supreme Court of the State of New York acquired no jurisdiction on the first writ of habeas corpus.

The matrimonial domicile of the family and parties was lost by the divorce and jurisdiction, especially summary jurisdiction, of the children thereafter would depend on their residence and presence.

When the children were residing in and attending school in Massachusetts the courts of New York had no jurisdiction over them.

> *Finlay* v. *Finlay*, 240 N. Y. 429;
> *Matter of Hubbard*, 82 N. Y. 91.

No decree or statute of New York (nor of Nevada) was violated when petitioner took his children to Massachusetts and the New York court had no right to order him to bring them into New York in order to obtain jurisdiction over them to try custody. Nor can jurisdiction be acquired by such order over objection.

> *Kamp* v. *Kamp*, 59 N. Y. 212, 215.

The Reno decree as a divorce concerning status may be entitled to full faith and credit but the Reno decree of custody cannot have and cannot be intended to have any effect outside of the State of Nevada.

> *People ex rel. Jones* v. *Johnson*, 205 A. D. 190;
> *People* v. *Dewey*, 23 Misc. 267;
> *Matter of Stewart*, 77 Misc. 524.

These children were never in Nevada and were in Massachusetts when the divorce was obtained.

The sovereign power of New York has limited the powers of the courts in habeas corpus proceedings as follows:

A. Section 1230, Civil Practice Act. To release when restrained or imprisoned "within the state".

B. Section 70, Domestic Relations Law; over children when the parents are separated but not divorced.

C. The Common Law writ. Limited to releasing children from illegal restraint within the state; not to try rights between parties, People ex rel. Pruyne v. Walts, 122 N. Y. 238, 241; is limited by the doctrine of parens patriae to "regulate the custody of infants found within the territory", Judge Cardozo in Finlay v. Finlay, 240 N. Y. 429; and this jurisdiction of necessity can only be exerted in respect of persons or property within the state (Matter of Hubbard)."

In *People* v. *Bork*, 96 N. Y. 188, the Court of Appeals said, at page 199.

> "It does not need the citation of authorities to the proposition that judicial power can only be exercised according to law, and that an attempt by an unauthorized tribunal to render judgment involving life, liberty or property, is a mere nullity. No man can be deprived of either without due process of law; nor can anyone exercise the judicial function without investiture by the sovereign power.

POINT II.

Jurisdiction of the court on the respondent's writ was properly raised by the petitioner's writ.

In neither of the courts below on the second writ did respondent attempt to sustain the jurisdiction of the court on the first writ but merely contended that the first court had ruled on the question of its own jurisdiction and this could only be attacked by direct appeal, relying on *O'Donoghue* v. *Bois,* 159 N. Y. 87, which states:

> "It is always open to the party against whom the judgment is offered to prove the want of jurisdiction in the court, even though such proof contradicts recitals in the record."

Except

> ". . . in a case where jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction."

No jurisdictional fact was litigated in favor of respondent. The only jurisdictional fact litigated was the residence and presence of the children in Massachusetts attending school which was against and not in favor of the party who averred jurisdiction.

It is doubtful if the exception is constitutional where liberty is involved for it would limit the writ of habeas corpus.

People ex rel. Tweed v. *Liscomb,* 60 N. Y. 559.

If the first court had no jurisdiction then the children were brought into the state and are detained against their will pursuant to void orders (the court even found that it was more fortunate for the children to be in Massachusetts

with their father which they preferred) and can be released by writ of habeas corpus, New York Civil Practice Act, Sections 1230 and 1253.

> "One is not bound to appeal from a void order or judgment but may resist it or assert its validity at all times."
>
> *Kamp* v. *Kamp*, 59 N. Y. 212, 215.

And one may review the question of jurisdiction even in the same or a lower court. People ex rel. Tweed v. Liscomb, 60 N. Y. 559.

> "While a party cannot review a judgment under the guise of a writ of habeas corpus, yet where his custody is unauthorized or unlawful, it seems quite clear that he has a right to that remedy to procure his discharge."
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> *People ex rel. Harris* v. *Gill*, 85 A. D. 192, 194.

CONCLUSION.

For the foregoing reasons, we urge that a writ of certiorari be issued as prayed for to review this case.

Respectfully submitted,

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